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friend to suffer more distress of mind through failure to attend the funeral or give succor to those afflicted than a grandparent or even one united by closer ties; and if the mental anguish theory is to be carried to its logical and legitimate conclusion a party competent to sue on an ordinary message should be permitted to prove his mental distress in those extraordinary death or "adversity" communications.³⁷

If the mere breach of the contractual relation between company and private parties is deemed to be actionable *ex delicto* and *per se*, the real danger in permitting such an element of damage in the telegraph cases seems at once apparent. Here any party proving mental grief by reason of the company's default has established a good cause of action. Thus, in tort actions it appears wiser to recognize that mental anguish should only be admitted when supported by a claim to some primary damage.³⁸

In conclusion, it may be said that at present the law is in a deplorably chaotic condition and bids fair to so remain unless there be legislative intervention or unless the courts discontinue to deduce what appear to be arbitrary distinctions.

INJUNCTION TO PROTECT WIFE'S DOWER RIGHT IN LANDS ALIENED BY HUSBAND WITHOUT HER JOINDER.—The extent to which the courts should go in the protection of the wife's inchoate right of dower is a question which has given them no little trouble. The ancient maxim that "the law favors dower" is, in general, expressive of the attitude of the courts, but it is too indefinite to be of great value in determining the extent of the favor shown to the wife. In approaching this question it is of fundamental importance to look to the nature of the dower right. Dower before the husband's death has always been considered a mere inchoate right, a contingent possibility, not so high as an interest in land.¹ But in spite of the fact that it is only a contingent possibility and does not rise to the dignity of an estate in land until after the husband's death, yet, as is obviously proper, the law has allowed many of the incidents of property to be attached to it. As has been well said, "it is a subsisting and valuable interest which will be protected and preserved."² In line with this policy it has been held

¹ *Randall v. W. U. Tel. Co.*, 32 Ky. L. Rep. 859, 107 S. W. 235, 15 L. R. A. (N. S.) 277 and note. In this case damages for mental anguish were refused although the plaintiff had been prevented from attending the funeral of his fiancee.

² *Connelley v. W. U. Tel. Co.*, *supra*. In this case damages for mental anguish were denied because the action was *ex delicto* and there had been no payment of toll fee by the plaintiff, the message having been sent *gratis*. The case is well reasoned and is convincing.

¹ *Flynn v. Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98; *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473.

² *Simar v. Canaday*, 53 N. Y. 298, 304.

that the wife is properly joined with her husband in an action against one who has fraudulently induced her husband and herself to convey property;³ that she may file a bill to protect her interest from fraud;⁴ and that where, on foreclosure of a mortgage on property owned by a husband, his wife not being made a party, she has the right, by virtue of her inchoate right of dower, after the sale, to redeem the property during the husband's lifetime.⁵

But the wife's rights during the husband's lifetime against an alienee from the husband by deed in which she did not join give rise to some of the most perplexing problems in the law of dower. In the recent case of *Rumsey v. Sullivan* (App. Div.), 150 N. Y. Supp. 287, the court was asked by a wife, while the husband was still alive, to enjoin a grantee of the husband alone from drilling for oil on the land aliened and from removing any oil from the land, on the ground that such acts constituted waste which the wife claimed she had a right to enjoin. The court, very properly it seems, declined to interfere.

The precise question presented here seems not to have been raised before, but there are several reasons which might be urged in support of the decision. The most important of these follows from the nature of the estate taken by the grantee and the nature of the interest left in the wife. The grantee from the husband without the wife's joinder takes full title to the property with the wife's dower right outstanding.⁶ It appears that no court ever interfered, at the suit of the wife, with a husband's use of the natural resources on his property, even though he exhaust them; and from the contingent nature of the wife's interest any such interference would seem entirely unwarranted. The grantee succeeds to all of the husband's rights in the property, but, without her joinder in the deed, her interest remains as before and certainly in no way diminished, since it is not within the power of the husband to defeat the inchoate dower right by his sole act after the necessary requisites have once come about.⁷ Nor would there seem to be any reason why the mere fact of alienation without her joinder should lessen the contingency of the wife's interest, or give her in any way a greater measure of control over the property.⁸ The effect of her joinder in her husband's conveyance

³ *Simar v. Canaday*, *supra*.

⁴ *Brown v. Brown*, 82 N. J. Eq. 40, 88 Atl. 186; *Buzick v. Buzick*, 44 Iowa 259, 24 Am. Rep. 740.

⁵ *McKenna v. Fidelity Trust Co.*, 184 N. Y. 411, 77 N. E. 721, 3 L. R. A. (N. S.) 1068.

⁶ See *Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531.

⁷ See *Overturf v. Martin*, *supra*; *Delaney v. Manshem*, 146 Mich. 525, 109 N. W. 1051. To the generally conceded proposition that the husband cannot defeat the wife's dower by his sole act, there seems to be an admitted exception in the case where he alone by a voluntary dedication to the public use cuts off her dower, since it is equivalent to a condemnation. *Venable v. W. R. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68.

⁸ *Overturf v. Martin*, *supra*.

throws some light on the nature of her interest. It has been repeatedly held that her joinder in his deed passes no interest or estate from the wife, but merely operates to extinguish her claim to dower.⁹ The dower right not being an interest or estate in the land, there would seem to be no justification for the court's interference with the owner's use of it, so long as he makes no attempt to defeat her right by a conveyance in fraud thereof.

A suggestion as to what is the correct doctrine in such a case is found in the decisions relating to the time at which the land should be valued for purposes of assignment of dower. The English doctrine is that the wife takes dower in the land aliened valued in all cases at the time of the assignment, just as in case of land which descends to the heirs.¹⁰ In the United States this doctrine has been modified, so that while the land is valued as of the time of the assignment, yet the wife is not allowed to profit by an increase of value due to the alienee's improvements.¹¹ But, as has been said, "this is a good rule which does not work both ways," and while the wife does not profit by the alienee's improvements, she nevertheless loses by any depreciation due to acts of waste committed by him during the husband's lifetime,¹² though it seems to be otherwise as to waste committed after his death.¹³ Thus, it appears that waste by the alienee during the husband's lifetime is not a wrong to the wife for which she would have redress after it was committed. But if the alienee could not be held to account after committing the act, there would seem to be no ground for a court of equity to stay the doing of the act when threatened. The first and fundamental requisite of equitable interference by injunction is that there must be a threatened violation of a recognized right.¹⁴ As shown above, the wife has no right to demand dower as of the value at the time of alienation, but as of the value only at the time of assignment. This being so she has no right to demand that the alienee keep the value the same as at the alienation, or guarantee that her dower will be of the same value after the husband's death and when she demands an assignment, as it would have been had the husband died at the time of the alienation. But this would, in effect, be the result of granting an injunction restraining a proprietor from removing minerals from land which he bought for the purpose, merely because his grantor's wife had an outstanding contingent dower right in the property.

The decision in the principal case is only a continuation of the well-known policy of the law not to interfere with the owner's use and occupancy of his property so long as he does not impair

⁹ *Hinchliffe v. Shea*, 103 N. Y. 153.

¹⁰ *Williams v. Thomas* (1909), 1 Ch. 713.

¹¹ *Westcott v. Campbell*, 11 R. I. 378; and see *Sanders v. McMillian*, 98 Ala. 144, 11 South. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425.

¹² *McClanahan v. Porter*, 10 Mo. 746; *Sanders v. McMillian*, *supra*; *Westcott v. Campbell*, *supra*.

¹³ See *Sanders v. McMillian*, *supra*.

¹⁴ 5 POMEROY, Eq., § 263.

the rights of others. The wife can claim her dower only in case she survives her husband and until then she should not be allowed to dictate either to the husband, or to anyone holding under him, as to the use made of the property. As has been said: "Her right is always inchoate and subject to the changes, improvements, dilapidation, or depreciation which may occur during his lifetime. Any other rule would occasion great confusion as to what one may or may not do with his own property."¹⁵ It would seem proper that the same incidents of property should attach to the wife's contingent dower right when the alienee has the property as when the husband has it. Thus, where a wife has dower in the equitable estate of her husband and the latter buys real estate and takes title in another, the wife can maintain a bill to protect her interest against the possibility of a conveyance to innocent purchasers, even before it becomes consummate.¹⁶ Protection in this way should be the limit of the interference by the courts in the husband's lifetime, whether the title remains in him, or has been transferred.

ANNULMENT OF MARRIAGES ON THE GROUND OF FRAUD.—In this country the annulment of marriages on the ground of fraud is allowed with greater liberality than in England.¹ There a marriage may be avoided only for *fraud in the factum* or that fraud which procures an appearance without a reality of consent, and fraud inducing a real consent is no grounds for declaring the marriage a nullity.² In the United States the courts generally have relaxed the stern and simple doctrine of England and under penalty of establishing one more difficult of application have granted relief in certain cases of exceeding hardship.³ So concealment by the woman of the fact that at the time of the marriage she is pregnant by another man, is fraud sufficient to entitle the husband to have the marriage avoided.⁴ This departure from the severe English rule seems a salutary innovation in the common law; the imposition of the support of spurious children upon an innocent husband and the unfitness of the wife to execute the marriage contract and to take upon herself the duties of a chaste and faithful wife, appear sufficient reasons for granting the relief. Similar to the law

¹⁵ *Rumsey v. Sullivan*, 150 N. Y. Supp. 287, 290. (Principal case.)

¹⁶ *Brown v. Brown*, *supra*.

¹ *Moss v. Moss*, L. R. (1897), Prob. Div. 263; see XIII HARV. LAW REV., 118 *et seq.*

² *Moss v. Moss*, L. R. (1897) Prob. Div. 263.

³ BISHOP, MAR., DIV. & SEP., § 452 *et seq.*

⁴ *Sinclair v. Sinclair*, 57 N. J. Eq. 222, 40 Atl. 679; *Reynolds v. Reynolds*, 3 *Allen* (Mass.) 605; *Harrison v. Harrison*, 94 Mich. 559, 34 Am. St. Rep. 364; *Baker v. Baker*, 13 Cal. 88. But in *Long v. Long*, 77 N. C. 304, 24 Am. Rep. 449, it was held that antenuptial pregnancy by another man, though concealed from the husband, was no ground for divorce.